

## U.S. Department of Justice

United States Attorney
Southern District of New York

86 Chambers Street, Third Floor New York, New York 10007

April 16, 2014

## **BY HAND**

The Honorable Laura Taylor Swain United States District Judge 500 Pearl Street, Room 755 United States Courthouse New York, NY 10007

Re: Riverkeeper, Inc., et al. v. Jackson, 93 Civ. 314 (LTS)

Dear Judge Swain:

This Office represents the U.S. Environmental Protection Agency ("EPA") in the above-referenced action, which the Court dismissed, subject to a right to reopen, in December 2010. Since that time, EPA has undertaken a notice-and-comment rulemaking to implement section 316(b) of the Clean Water Act ("CWA") as contemplated in the settlement it reached with Riverkeeper and its co-plaintiffs (collectively, "Riverkeeper"). In February, the Court scheduled a conference on April 23, in the event that EPA has not completed its rulemaking before April 17. In advance of that conference, I write respectfully to advise the Court of (i) the status of the section 316(b) rulemaking, (ii) EPA's intention to complete the rulemaking by May 16, 2014, and (iii) EPA's discussions with Riverkeeper regarding EPA's plan to complete the rulemaking. I also respectfully enclose a declaration of Robert K. Wood, Director of the Engineering and Analysis Division at EPA's Office of Water, concerning the status of this rulemaking.

First, as the Court is aware, EPA and Riverkeeper amended their settlement agreement in February 2014 to extend the deadline for completing the section 316(b) rulemaking to April 17, 2014. This was to allow EPA to complete formal inter-agency consultations under the Endangered Species Act ("ESA") with the Fish and Wildlife Service and the National Marine Fisheries Service (together, the "Services"), as suggested by Riverkeeper in a public comment on EPA's proposed rule. Mr. Wood's declaration explains the efforts that EPA and the Services have made to complete the ESA consultations. To date, however, EPA and the Services have not been able to finish that consultation process. Thus, EPA will not complete the section 316(b) rulemaking by tomorrow, April 17.

Second, in light of this delay, EPA has conferred with the Services regarding the timeframe for finishing the ESA consultations, and EPA expects to receive the final, joint

When it executed the Fifth Amendment with Riverkeeper, EPA expected to conclude the ESA consultations in advance of April 17. Indeed, EPA stated that it did not intend to seek a further extension. However, due to the complexity of the inter-agency consultations, EPA and the Services have realized that an additional 29 days will be needed.

biological opinion from the Services in time for the EPA Administrator to sign for publication in the Federal Register a notice of her final decision pertaining to the issuance of requirements implementing section 316(b) of the CWA at existing facilities on May 16, 2014. Specifically, as Mr. Wood states in his declaration, the Services have confirmed to EPA that the ESA consultations will be completed and that EPA can take final action by May 16.

Third, on April 14, counsel at EPA and I contacted Riverkeeper's counsel to explain that EPA will not complete the section 316(b) rulemaking by April 17 and that EPA and the Services are taking steps to enable EPA to complete that rulemaking by May 16, 2014. Accordingly, EPA asked Riverkeeper to consider further amending the settlement agreement to extend the deadline or another alternative to recommencing litigation in this matter. As of today, EPA has not received a response from Riverkeeper.

I thank the Court for its consideration of this letter and Mr. Wood's declaration. On April 23, I expect to attend the previously scheduled conference along with Richard T. Witt, an attorney from the EPA Office of General Counsel.

Respectfully,

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